(2)

Supreme Court, U.S.
FILED

04-989 JAN 3 - 2005

OFFICE OF THE CLERK

No.

In the

SUPREME COURT OF THE UNITED STATES

Sarah Jenkins Horton et al.,
Petitioners

v.

Bank One, N.A. et al.,
Respondents

On Petition for Writ of Certiorari
to the
United States Court of Appeals
for the Fifth Circuit

[PETITION FOR WRIT OF CERTIORARI]

SUPPLEMENTAL APPENDIX

Patricia J. Matassarin
Counsel of Record
2810 Whisper Fawn
San Antonio, Texas 78230
Phone/Fax: (210)493-3844

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS:

May 6, 2003 U.S. District Court
Order Denying Remand 20a

June 17, 2003 U.S. District Court
Order Certifying Issue for
Interlocutory Appeal 27a

August 11, 2003 Fifth Circuit
Order Allowing Interlocutory Appeal . . . 33a

Filed
Austin Division
MAY 6, 2003
Western Dist. of Texas
U.S. Clerk's Office
By: s/ KW

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Sarah Jenkins Horton and George Leon Matassarin,

Plaintiffs,

v. Case No.A-03-CA-150-SS

Bank One, N.A.; Bank One Corporation and Bank One Wisconsin

Defendants.

ORDER

BE IT REMEMBERED on the 5th Day of May, 2003 the Court reviewed the file in the above-styled cause, specifically Plaintiffs' Motion to Remand and Request for Fees and Sanctions [#4] and Defendants' response [#5]. Having considered the motion and response, the case files as a whole and the applicable law, the Court enters the following opinion and order.

Factual and Procedural Background

The Plaintiffs, Sarah Jenkins Horton and George Matassarin, are Texas residents residing in Bastrop County and Bexar County, respectively. *See* First Amended Petition at [paragraph]1-2. The plaintiffs allege Horton entered into a loan agreement on July 7, 1999 with "Bank One, Texas NA" for financing of an automobile purchase. *Id.* at [paragraph] 6. Matassarin executed the agreement as a co-signor on the loan. *Id.* at [paragraph] 9. The plaintiffs contend the bank misappropriated Horton's payments to go toward interest only and made unauthorized transfers from her bank account. *Id.* at [paragraphs] 8,10,15. Additionally, they allege the defendants made adverse credit reports against both Horton and Matassarin. *Id.* at [paragraph]18. Finally, they assert the defendants harassed Horton and misrepresented their corporate status. *Id.* at [paragraphs] 19,20.

The plaintiffs filed their original petition in the 335th Judicial District Court of Bastrop County, Texas, Cause No. 24,221, on July 24, 2002. They sued Bank One Texas Corporation, Bank One Wisconsin a/k/a/ Bank One Corporation Midwest Regional Indirect Collections Center, and Banc One Credit Company, but not serve any of these defendants. They filed their first amended petition on December 5, 2002, suing Bank One, N.A., Bank One Corporation, and Bank One Wisconsin, a wholly owned subsidiary of Bank One, N.A. and a/k/a/ Bank One Corporation Midwest Regional Indirect Collections Center. The defendants contend they were served on or about December 10, 2002. In

their first amended petition, the plaintiffs allege violations of the Deceptive Trade Practices Act ("DTPA"), raise tort claims for intentional infliction of emotional distress and defamation, and request actual and punitive damages and attorney's fees. See First Amended Petition at [paragraphs] 20-23. They also state the defendants' actions constitute violations of the federal Fair Debt Collection Practices Act and the federal Truth in Lending Act and seek statutory penalties and attorney's fees under those laws. *Id.* at [paragraph] 25.

The defendants filed a motion to transfer venue, a plea in abatement, and an answer with special exceptions and a counterclaim on December 26, 2002. The counterclaim asserts Horton and Matassarin are in default under the terms of the loan agreement and seeks repayment of the principal and interest along with collection costs and attorney's fees. The plaintiffs answered the counterclaim on February 4, 2003. The defendants withdrew their motion to transfer on March 6, 2003. On March 12, 2003, the defendants removed the case to this Court. The plaintiffs now seek to remand the case to state court.

Analysis

The plaintiffs move to remand to state court. The removing party bears the burden of establishing federal jurisdiction. *De Aguilar v. Boeing Co.*, 47 F.3d 1404,1408 (5th Cir.), cert. denied, 516 U.S. 865 (1995). The defendants removed this case on the basis of diversity jurisdiction. A federal court has diversity jurisdiction over a case if it involves citizens

of different states and the amount in controversy exceeds $75,000.00, exclusive of interest and costs. 28 U.S.C. 1332 [sec.] 1332(a). When the complaint does not state the amount of damages a plaintiffs seeks, the defendant must prove the amount in controversy by a preponderance of the evidence. *Luckett v. Delta Airlines, Inc.,* 171 F.3d 295,298 (5th Cir. 1999). In this case, the plaintiffs concede the amount in controversy exceeds $75,000 but argue the defendants' removal was untimely. Additionally, the plaintiffs argue there is not complete diversity among the parties.

The plaintiffs' first amended petition does not state a monetary amount of damages sought. If a lawsuit is removable at the time of filing, the defendants must remove within thirty days of receiving the summons and complaint. 28 U.S.C. [sec.] 1446(b). If a suit is not removable at the time of filing, the defendants must file a notice of removal within thirty days of receiving a copy of an amended pleading, motion, order or other paper from which the defendants can ascertain the case has become removable. 28 U.S.C. [sec.] 1446(b). The information supporting removal in the amended pleading or other paper must be "unequivocally clear and certain" to start the thirty-day clock. *Basky v. Kroger Texas, LP*, 288 F.3d 208, 211 (5th Cir. 2002).

The defendants claim their March 12 removal was timely because they did not realize the amount in controversy exceeded $75,000 until they received a written settlement offer from the plaintiffs on February 28, 2003 in compliance with the notice

requirements of the DTPA. *See* Notice of Removal. Ex. B ("Johnson Affidavit"), at [paragraph] 5. The Fifth Circuit has held a post-complaint letter dealing with settlement terms may constitute an "other paper" for purposes of 28 U.S.C. [sec.} 1446(b). *Addo v. Globe Life and Accident Ins. Co.,* 230 F.3d 759,762 (5th Cir. 2000). The plaintiffs contend the defendants knew or should have known the amount in controversy exceeded $75,000 when they filed their counterclaim on February 4, 2003. The plaintiffs allege the defendants knew the plaintiffs sought at least $50,000 in damages because they stated in their first amended petition that discovery would be conducted under level 2 of Rule 190 of the Texas Rules of Civil Procedure instead of level 1, which applies to suits involving $50,000 or less. The plaintiffs further allege the defendants' counterclaim brought the amount in controversy to over $75,000 because even though the defendants sought only $10,753.07 in damages, they asserted discovery should be conducted under level 2. Therefore, the plaintiffs argue, the defendants must have been seeking almost $40,000 in attorney's fees to qualify for level 2 discovery and should have assumed the plaintiffs would seek that amount for attorney's fees as well. The plaintiffs' far-fetched argument does not consider that the plaintiffs' amended petition only requested $4,000 in attorney's fees or that cases involving less than $50,000 can also be conducted under discovery level 2 if both parties agree (which they did in this case). *E.G.,* TEX.R.CIV.P. 190.2. Even assuming the discovery level pleaded by plaintiffs in accordance with the Texas Rules of Civil Procedure is relevant to calculating the amount in

controversy for federal jurisdictional purposes, the Court finds the defendants have shown they did not have unequivocal evidence that the amount in controversy exceeded $75,000 until February 28, 2003. Accordingly, removal was timely.

The plaintiffs also contend this Court does not have diversity jurisdiction over the above-styled cause because there is not complete diversity among the parties. For jurisdictional purposes, a national banking association is a citizen of the state in which it is "located." 28 U.S.C. [sec.] 1348. The plaintiffs argue a banks is "located" wherever it can be found and , since the defendants have Bank One offices in Texas, it is located here. The plaintiffs cite district court cases holding banks are located in every state in which they have branches. *E.G., Connecticut Nat'l Bank v. Iacono,* 785 F. Supp. 30 (D.R.I. 1992). However, other district courts and the Court of Appeals for the Seventh Circuit have taken the opposite position, holding banks are located in the state of their principal place of business and the state listed on their organization certificates. E.G., Firstar *Bank, N.A. v. Faul,* 253 F.3d 982 (7th Cir. 2001); *Baker v. First Am. Nat'l Bank,* 111 F. Supp.2d 799 (W.D. La. 2000). The Seventh Circuit based its holding on an analysis of the historical background and canons of statutory interpretation, concluding Congress intended in 28 U.S.C. [sec.] 1348 to give national banks the same jurisdictional access to federal courts as state banks and other corporations. *Firstar,* 253 F.3d at 993. A district court in the Northern District of Texas followed the *Firstar* line of cases and held banks are located only in the state of their

principal place of business. *Bank One, N.A. v. Euro-Alamo Investments, Inc.*, 211 F. Supp2d 808, 810 (N.D. Tex. 2002). The Fifth Circuit has not ruled on the issue.

This Court finds the Seventh Circuit's reasoning persuasive in light of its extensive discussion of the history and circumstances surrounding the inclusion of the relevant language in the statute. If the Court were to interpret the statute to render national banks citizens of every state in which they have a branch, many banks would never receive the benefits of federal diversity jurisdiction. Therefore, the Court holds national banks are "located" in the state of their principal place of business and the state listed on their organizational certificate. The defendants have presented evidence that Bank One, N.A. is a national banking association with its principal place of business in Chicago; Bank One, N.A. is the successor by merger to Bank One Wisconsin, which was a state banking association chartered under Wisconsin law prior to the merger; and Bank One Corporation is a bank holding corporation organized under Delaware law with its principal place of business in Chicago. *See* Johnson Affidavit, at [paragraph] 4. Therefore, none of the defendants is a Texas citizen and there is complete diversity among the parties.

The Court holds it has subject matter jurisdiction over the above-styled cause, despite the plaintiffs' aversion to federal court. It is apparent from the motion to remand that the plaintiffs' counsel has never appeared in federal court, as the motion relies on outlandish accusations and overbroad conspiracy

theories and is wholly devoid of the professionalism expected of lawyers who practice in federal court. The Court expects the plaintiffs' future pleadings to rely on evidence and legal authority instead of generalized attacks on "rich corporate defendants," "big rich banking corporations and their bevy of lawyers" or "Rich Banks who steal poor people's money."

In accordance with the foregoing:

IT IS ORDERED that Plaintiffs' Motion to Remand and Request for Fees and Sanctions {#4} is DENIED.

SIGNED this the 5th day of may 2003.

S/_____
SAM SPARKS
UNITED STATES DISTRICT JUDGE

FILED
AUSTIN DIVISION

2003 JN 17 PM 3:31

Western District of Texas
By: s/_____
Deputy

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

**SARAH JENKINS HORTON AND
GEORGE LEON MATASSAIN,**
Plaintiffs,

-vs- Case No. A0930CA0150-SS

**BANK ONE, N.A.; BANK ONE CORP-
ORATION; AND BANK ONE WISCONSIN**
Defendants.

O R D E R

BE IT REMEMBERED on the 17th day of June 2003 the Court reviewed the file in the above-styled cause, specifically the Plaintiffs' Motion for Certification that Order Denying Remand is Proper for an Interlocutory Appeal [#10] and the Defendants' response thereto [#14] and amended response [#15]./ Having considered the motion and response, case file

as a whole and the applicable law, the Court enters the following opinion and order.

On May 5, 2003, the Court signed an Order denying the plaintiff's motion to remand, holding: (1) the defendants' removal was timely because it was within thirty days of the defendants' receipt of a written settlement offer indicating the amount in controversy is over $75,000: and (2) the Court has diversity jurisdiction over the above-styled cause because the defendants are not Texas citizens and the amount in controversy exceeds $75,000.00. On May 19, 2003, the plaintiffs filed a motion for the Court to certify its Order denying remand for interlocutory appeal under 28 U.S.C. [sec.] 1292(b).

Generally, an order denying remand may not be appealed until after judgment is entered. See *Caterpillar Inc. v. Lewis,* 519 U.S. 61, 74, 117 S.Ct. 467 (1996). A district court may, in its discretion, certify a not otherwise appealable order under 28 U.S.C. [sec.] 1292(b) when it is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. [sec.] 1292(b).[1]

---

[1] The defendants argue in their response that appeal is precluded by 28 U.SC. [sec.] 1447(d). However, that section relates only to federal court orders remanding causes to state court, not orders denying motions to remand. Thankfully, the defendants

The plaintiffs contend the order denying remand is appropriate for interlocutory appeal because: (1) courts differ as to whether national banking associations are citizens of every state in which they are located; and (2) whether a settlement offer can establish an amount in controversy for removal purposes. As to the second question, the Court notes it is settled law in the Fifth Circuit that a post-complaint settlement letter constitutes an "other paper" for purposes of triggering the thirty-day deadline for removal under 28 U.S.C. [sec.] 1446(b). *See Addo v. Globe Life & Accident Ins. Co.*, 230 F.3d 759, 762 (5th Cir. 2000). Because the plaintiffs' state court petition did not state the amount of damages sought, the defendants did not know the amount in controversy exceeded $75,000.00 until they received plaintiffs' counsel's February 28, 2003 letter stating each plaintiff sought $30,000 in personal injury damages and plaintiffs' counsel had already accrued $54,500 in attorney's fees and expected to bill in excess of $150,000 by the conclusion of the lawsuit. Because the Court finds the law clearly establishes the timeliness of the removal, interlocutory appeal is inappropriate on this question.

However, the Court considers the question of whether national banking associations are citizens of every state in which they have a branch to be an appropriate question for interlocutory appeal under 28 U.S.C. [sec.] 1292(b). As discussed in the order

---

recognized this point and removed this argument from their amended response.

denying remand, courts have split on whether a national banking association is "located" for jurisdictional purposes in any state where it has a branch or only in the state in which its principal place of business is located and the state listed on its organizational certificate. Under 28 U.S.C. [sec.] 1348, national banking associations are "deemed citizen of the State in which they are respectively located." 28 U.S.C. [sec.] 1348. Courts have followed two varying definitions of "located." One line of cases beginning with the Rhode Island federal district court's decision in *Connecticut Nat'l Bank v. Iacono,* 785 F.Supp. 30 (D.R.I 1992) holds national banking associations are "located" wherever they have branch offices. *See Also First Union Corp.* v. *Am. Cas. Co., of Reading, P.A.*, 222 F.Supp2d (W.D.N.C. 2001); *Schmidt v. Fleet Bank,* 16 F.Supp.2d 340,3543 (S.C.N.Y. 1998); *Ferraiolo Constr. v. Keybank N.A.,* 978 F.Supp.23,23 (D.Maine 1997); *Norwest Bank Minnesota N.A. v. Patton,* 924 F.Supp. 114,115 (D. Colo, 1996); *Bank of New York v. Bank of Am.,* 861 F.Supp. 225,231 (S.C.N.Y 1994). Other courts, including the only circuit court to issue a decision on the issue, have held a bank is "located" only in the state of its principal place of business and the state listed on its organizational certificate. *E.G., Firstar Bank N.A. v. Faul.,* 253 F.3d 982 (7th Cir. 2001); *Pitts v. First Union Nat'l Bank,* 217 F.Supp.2d 629, (D.Md. 2002); *Bank One, N.A. v. Euro-Alamo Investments, Inc.,* 211 F.Supp.2d 808,810 (NN.D. Tex. 2002); *Bank of Am., N.A. v. Johnson,* 186 F.Supp.2d 1182 (W.D. Okla. 2001); *Baker v. First Am. Nat'l Bank,* 111 F.Supp.2d 799 (W.D. La. 2000); *Financial Software Sys. Inc. v. First Union Nat'l*

Bank, 84 F.Supp.2d 594 (E.D. Pa., 1999). In its May 5, 2003 order, this Court agreed with the well-researched reasoning in the latter line of cases and concluded it has diversity jurisdiction.

As the above citation strings indicate, the meaning of "located" in 28 U.S.C. [sec.] 1348 for purposes of diversity jurisdiction is a hotly contested issue. There are two distinct trails of precedent courts an follow, and the Fifth Circuit has yet to give a signal as to which direction the district courts within it should go. At least two other district courts in the Fifth Circuit have gone the same route as this Court. If this Court has chosen the wrong path, it has no jurisdiction over the above-styled cause and any further proceedings in the case will be fruitless. Accordingly, because courts are split on this issue and the issue materially affects the ultimate termination of the lawsuit in this Court, the Court holds its May 5, 2003 order denying the plaintiff's motion to remand is appropriate to certify for interlocutory appeal under 28 U.S.C. [sec.] 1292(b). *See, e.g. Tedford v. Warner-Lambert Co.*, 327 F.3d 423 (5trh Cir. 2003) (hearing interlocutory appeal of district court's denial of motion to remand where circuit court had not decided an issue and district courts had come to different conclusions); *Grant v. Chevron Phillips Chem. Co.*, 309 F.3d 864,866(5th Cir. 2002) (district court's certification of order denying remand for interlocutory appeal was "highly principled" where amount in controversy question had divided district courts).

In accordance with the foregoing:

IT IS ORDERED that Plaintiffs' Motion for Certification that Order Denying Remand is Proper for an Interlocutory Appeal [#10} is GRANTED, and the Court's order of May 4, 2003 denying plaintiffs' motion to remand is hereby CERTIFIED for interlocutory appeal under 28 U.S.C. [sec.] 1292(b).

SIGNED this 17th day of June, 2003.

S/__ _____
SAM SPARKS
UNITED STATES DISTRICT JUDGE

U.S. Court of Appeals
FILED
JUL 31, 2003
CHARLES R. FULBRUGE III
Clerk

FILED

AUG 11, 2003
Clerk U.S> District Court
Western District of Bexas
By: s/_____
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. o3-31

SARAH JENKINS HORTON,
GEORGE LEON MATASSARIN
Plaintiffs-Counter Defendants-Petitioners
v.

BANK ONE NA
Defendant-Counter Claimant-Respondent
v.
BANK ONE CORPORATION, BANK ONE WISCONSIN
Defendants - Respondents

Petition for Leave to Appeal
from an Interlocutory Order

Before BARKSDALE, EMILION M. GARZE AND DENNIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Western District of Texas, Austin, entered on 6 May, 2003, is GRANTED, as to the issue certified by the district court on 17 June 2003 for interlocutory appeal: whether national banking associations are citizens of every state in which they have a branch.

A true copy
Test:
Clerk U.S. Court of Appeals, Fifth Circuit

By s/ Mary Stewart____
Deputy June 31, 2003

s/R_B
7/17/03

s/ SMG

s/ JD